IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33073

STATE OF IDAHO,	)	**2008 Opinion No. 6**
	)	
Plaintiff-Respondent,	)	**Filed: January 23, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
DAVID D. PURDUM,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Oneida County. Hon. Don L. Harding, District Judge.

Order denying motion to suppress, affirmed.

Molly J. Huskey, State Appellate Public Defender; Nicole Owens, Deputy Appellate Public Defender, Boise, for appellant. Nicole Owens argued.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

SCHWARTZMAN, Judge Pro Tem

David D. Purdum appeals from the judgment of conviction entered upon his conditional guilty plea to possession of a controlled substance, contending that the district court erred in denying his motion to suppress. We affirm.

I.
FACTUAL & PROCEDURAL BACKGROUND

The parties stipulated to the following facts. In an unrelated case, Purdum was placed on five years of probation for possession of methamphetamine. The district court imposed numerous conditions of probation, two of which are pertinent here. The order of probation provided that "The Defendant shall submit to random blood, breath and/or urine analysis upon the request of the Court, his probation officer or any law enforcement official." It further required that "The Defendant shall submit to searches of personal property, automobiles and residence without a search warrant at the request of his probation officer." Shortly thereafter,

Purdum signed a "Community Corrections Agreement of Supervision." This agreement stated that he "agree[d] and consent[ed] to the search of [his] person, automobile, real property, and any other property at any time and at any place by any Agent of the Division of Community Corrections and waive[d] [his] constitutional right to be free from such searches." It also stated that he "agree[d] to submit to tests for controlled substances or alcohol . . . as requested by [his] supervising officer or any agent of the Division of Community Corrections."

Two years later, a police officer on patrol saw Purdum driving a vehicle. The officer recognized Purdum and was aware of his probation conditions, so decided to stop Purdum and ask him to submit to a drug test. The officer did not articulate any suspicion that Purdum was violating his probation and was not acting at the request of the probation officer. Before the officer began to approach, Purdum parked his vehicle in his father's driveway. As the officer approached, Purdum exited his vehicle while talking on a cellular telephone. Purdum took approximately ten steps away from his vehicle, then ran out of sight. When Purdum started running, the officer activated his emergency lights, sounded his air horn, pulled his patrol vehicle into the driveway, exited his vehicle, and found Purdum hiding in a shed. The officer ordered Purdum to hang up the telephone and exit the shed or risk an obstruction charge. Purdum complied and indicated that he had a knife in his pocket. As the officer began a pat-down search for the knife, Purdum bolted again. He was apprehended when he tripped, at which time the officer arrested Purdum for obstructing an officer. The officer searched Purdum and found two "Bic" lighters and one butane lighter in his pocket. After Purdum was placed in the patrol vehicle, the officer then searched Purdum's car as "incident to arrest." He initially searched the passenger compartment, finding a butane torch and can of butane in the glove box, and a bottle of urinary supplemental pills and one of Visine in the center console. Based on his experience and training, the officer associated these items with drug use, and so decided to search the motor compartment of the vehicle where he knew drugs were often hidden. He found drugs and drug paraphernalia in the air filter compartment.

Purdum was charged with possession of a controlled substance, Idaho Code § 37-2732(c)(1). Purdum filed a motion to suppress, arguing the police officer did not have the authority to detain him. The district court denied the motion, reasoning that "since Mr. Purdum consented to warrantless searches as a term of his probation, and since he consented to allow any probation or law enforcement officers to request a blood, breath, or urine test, the deputy did not

need reasonable suspicion to make the stop and search the defendant." Purdum entered a conditional guilty plea, and now appeals, arguing that the district court erred in denying his motion to suppress.

II.
ANALYSIS

A. Standard of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999). In this case, the facts are uncontroverted, and we are therefore presented with only an issue of law as to whether the evidence stipulated to by both parties sufficed to meet constitutional standards.

B. The Officer Did Not Unlawfully Seize Purdum

The sole issue on appeal in this case is whether the officer had authority to seize and detain Purdum without suspicion and demand that he submit to a drug test.[1] Purdum contends that this seizure was unlawful, and thus that the evidence discovered in the subsequent search of his vehicle must be suppressed because it was obtained through the government's exploitation of this illegality. *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Zuniga*, 143 Idaho 431, 434, 146 P.3d 697, 700 (Ct. App. 2006). The state counters that Purdum's waiver, given as a condition of his probation, that he would "submit to random blood, breath and or/urine analysis

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[1] During oral argument, Purdum's attorney conceded that counsel below did not independently challenge the legality of the search of the vehicle. We therefore do not address whether the search of the vehicle itself was a lawful search incident to arrest under *New York v. Belton*, 453 U.S. 454 (1981); *see State v. Champagne*, 137 Idaho 677, 52 P.3d 321 (Ct. App. 2002); *compare State v. Foster*, 127 Idaho 723, 730, 905 P.2d 1032, 1039 (Ct. App. 1995), nor whether the police officer otherwise was justified searching the vehicle under the circumstances. Because these issues were not preserved for appellate review, we must assume, as Purdum has essentially stipulated, that if the seizure was lawful, so too were the subsequent searches of his person and vehicle.

upon the request of . . . any law enforcement official," gave the officer the authority to detain him for this purpose.

The Constitution protects against unreasonable seizures including seizures of the person. *Henry v. United States*, 361 U.S. 98, 100 (1959). The Fourth Amendment generally precludes the detention of an individual by an officer unless the officer has a reasonable, articulable suspicion that the person to be seized has committed or is about to commit a crime. *Florida v. Royer*, 460 U.S. 491, 498 (1983); *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *State v. Fry*, 122 Idaho 100, 103, 831 P.2d 942, 945 (Ct. App. 1991). Purdum was seized in this case, at the latest, when the officer ordered Purdum out of the shed, for a reasonable person would not have believed that he was free to leave under those circumstances. *See Zuniga*, 143 Idaho at 434, 146 P.3d at 700. The state does not contend that the officer had any suspicion that Purdum was engaged in criminality, and the evidence shows that the officer intended to contact Purdum only for the purpose of asking him to submit to a random drug test. The state argues, however, that the officer had authority to seize Purdum without suspicion in order to enforce the condition of probation which required him to submit to random drug testing at the request of any law enforcement official. Purdum contends that this condition did not give officers a concurrent right to stop him for this purpose.

In our recent case *State v. Cruz*, ___ Idaho ___, ___, ___ P.3d ___, ___ (Ct. App. 2007), *rev. denied*, we outlined the development of the law analyzing the interaction of a probationer or parolee's consent and the Fourth Amendment. We said:

> Idaho appellate courts have long-recognized that parolees and probationers have a diminished expectation of privacy and will enforce Fourth Amendment waivers as a condition of parole or probation. *See, e.g. State v. Gawron*, 112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987); *State v. Peters*, 130 Idaho 960, 963, 950 P.2d 1299, 1302 (Ct. App. 1997). Even in the absence of a warrantless search condition, a parole or probation officer may conduct a search of a parolee or probationer and his or her residence if the officer has "reasonable grounds" to believe that he or she has violated a parole or probation condition and the search is reasonably related to the disclosure or confirmation of that violation. *See State v. Klingler*, 143 Idaho 494, 497-98, 148 P.3d 1240, 1243-44 (2006). In *Klingler*, the Idaho Supreme Court upheld the warrantless search of an *unsupervised* probationer's residence based upon an unsubstantiated tip from a police detective that Klingler "may be dealing drugs," coupled with the probationer's drug history which indicated a heightened need for supervision. *Id.*, 143 Idaho at 498, 148 P.3d at 1244. Thus, the mere likelihood of facts justifying the search can be sufficient to constitute reasonable grounds. *Id*. *See also State v. Anderson*, 140 Idaho 484,

487-88, 95 P.3d 635, 638-39 (2004) (unconfirmed tips from a neighbor regarding detected odor of suspected methamphetamine lab, coupled with prior drug history and other rumors, sufficient to establish "reasonable grounds" or "reasonable suspicion" for warrantless search as a condition of bail pending appeal).

The United States Supreme Court has recently analyzed the constitutionality of warrantless searches of parolees and probationers under the general Fourth Amendment approach of examining the totality of the circumstances. *See Samson v. California*, ___ U.S. ___, ___, 126 S. Ct. 2193, 2197 (2006); *United States v. Knights*, 534 U.S. 112, 118 (2001). Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. *Samson*, ___ U.S. at ___, 126 S. Ct. at 2197; *Knights*, 534 U.S. at 118-19.

In *Knights*, a probationer challenged a warrantless search of his residence. The Supreme Court noted that the probationer's expectation of privacy was significantly diminished by a condition of his probation whereby he was subject to a search of his person or residence, without a warrant or reasonable cause, by any probation officer or law enforcement officer at any time. The Court held that, when an officer has "reasonable suspicion" that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable. *Knights*, 534 U.S. at 121. The Supreme Court declined to decide, however, whether the probation condition so diminished, or completely eliminated, the probationer's reasonable expectation of privacy that a search unsupported by individualized suspicion would have been reasonable. *See id.*, 534 U.S. at 120 n.6.

In *Samson*, the Supreme Court addressed the constitutionality of a search of a parolee on a public street conducted by an officer who possessed no individualized suspicion of the defendant, other than his knowledge that the defendant was a parolee. The parolee had agreed to a search condition, set forth by California law, whereby he was subject to search or seizure by a parole officer or other peace officer at any time, with or without a search warrant and with or without cause. *See* Cal. Penal Code Ann. § 3067(a) (West 2000). The Supreme Court held that a completely suspicionless search of the parolee on a public street was reasonable because the parolee's diminished expectation of privacy was outweighed by the state's substantial interest in supervising parolees. *See Samson*, ___ U.S. at ___, 126 S. Ct. at 2197-02. The parolee did not have an expectation of privacy that society would recognize as legitimate because of his status as a parolee, including the broad search condition. *Id.*, ___ U.S. at ___, 126 S. Ct. at 2199. While the Supreme Court reasoned that parolees have even fewer expectations of privacy than probationers, it disavowed the proposition that parolees, like prisoners, have no Fourth Amendment rights, *id.*, ___ U.S. at ___ & n.2, 126 S. Ct. at 2198 & n.2, and recognized California's prohibition against "arbitrary, capricious or harassing" parole searches. *Id.*, ___ U.S. at ___, 126 S. Ct. at 2202.

Although *Samson* was concerned with a parolee and not a probationer, we are convinced that it is the controlling law in this case. We have declined to recognize any distinction between the rights of parolees and probationers for the purpose of applying the Fourth Amendment. *State v. Pinson*, 104 Idaho 227, 230 n.1, 657 P.2d 1095, 1098 n.1 (Ct. App. 1983). *See also United States v. Williams*, 417 F.3d 373, 376 n.1 (3d Cir. 2005) ("[T]here is no constitutional difference between probation and parole for purposes of the [F]ourth [A]mendment") (quoting *United States v. Hill*, 967 F.2d 902, 909 (3rd Cir. 1992)). Pursuant to *Samson*, we therefore hold that, because of Purdum's reduced expectation of privacy as a probationer who had submitted to "random blood, breath and or/urine analysis upon the request of . . . any law enforcement official," the police officer was empowered to conduct a suspicionless search (i.e., drug test) of these bodily fluids. While the Idaho Supreme Court has said that conditions of probation, especially a waiver of a Fourth Amendment right, cannot be implied, *State v. Klingler*, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006), an officer must be able to temporarily detain a probationer in order to effectuate this search condition. Any other reading would render the provision a nullity. *See Brown v. State*, 127 P.3d 837, 844 (Alaska Ct. App. 2006) (if a probationer's conditions of probation authorize suspicionless searches of the probationer's person, an officer who wishes to exercise this authority has the concurrent right to stop and temporarily detain the probationer in order to conduct the search);[2] *People v. Viers*, 1 Cal. App. 4th 990, 993-94 (Cal. Ct. App. 1991) ("[p]ermission to detain is implicit in most Fourth Amendment waivers. . . . absent a detention the police cannot search a person and [areas] typically listed in Fourth Amendment waiver provisions") *overruled on other grounds by Myers v. Superior Ct.*, 124 Cal. App. 4th 1247 (Cal. Ct. App. 2004).

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[2] Interpreting their state constitution, the Supreme Court of Alaska has held unconstitutional a condition of probation giving police officers independent authority to require a probationer to submit to a search. *Roman v. State*, 570 P.2d 1235, 1243 & n.26 (Alaska 1977). The state legislature later codified this in Alaska Stat. § 33.16.150(b)(3). Thus, pursuant to the Alaska Constitution, "except when acting at the direction of a parole officer, police officers may not subject parolees to searches or seizures that would be unconstitutional if performed on the person or property of other citizens." *Reichel v. State*, 101 P.3d 197, 202 (Alaska Ct. App. 2004). Purdum makes no argument that we should interpret Article I, Section 17 of the Idaho Constitution in the same manner to provide greater protection than the Fourth Amendment.

By virtue of the probation waiver, the police officer in this case had the same authority as a probation officer to conduct random testing of Purdum's blood, breath, and/or urine, and to detain him for that limited purpose.[3] We hold, however, that a police officer certainly does not have any greater authority than a probation officer in this regard. The record does not contain evidence describing how a probation officer would arrange for and conduct such a drug test, and we therefore cannot assess the proper scope, mechanics, or logistics of a body fluid search and accompanying detention when conducted by a police officer on patrol. In this case, cuffing Purdum and removing him from the scene was properly done incident to his arrest for obstruction. Absent such circumstances, we express no opinion about how a detention for purposes of conducting a body fluid test may be reasonably implemented.

III.

CONCLUSION

Pursuant to the condition of probation requiring Purdum to submit to random testing of his breath, blood, and/or urine by police officers, the officer in this case was justified in detaining Purdum without suspicion for this limited purpose. We therefore affirm the district court's order denying the motion to suppress.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**

Judge Pro Tem SCHWARTZMAN, **ALSO SPECIALLY CONCURRING**

I write separately to emphasize the limits of today's ruling. This case treads on the outer limits of Fourth Amendment jurisprudence. In the absence of the holding by the United States Supreme Court in *Samson v. California*, ___ U.S. ___, 126 S.Ct. 2193 (2006), approving of suspicionless searches in circumstances similar to the case before us, I would have held that the search was constitutionally unreasonable. As Justice Stevens said in his dissent,

> The requirement of individualized suspicion, in all its iterations, is the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment. To say that those evils may be averted without that shield is, I fear, to pay lipservice to the end while withdrawing the means.

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[3] We note that the officer did not have independent authority, pursuant to Purdum's probation conditions, to conduct other searches, such as of Purdum's home, vehicle, or personal property. The terms of Purdum's probation gave the right to conduct these additional searches *exclusively* to probation authorities. A probation officer can, of course, request the assistance of a police officer in performing these duties. *See Cruz*, *supra; State v. Vega*, 110 Idaho 685, 687-88, 718 P.2d 598, 600-601 (Ct. App. 1986); *Pinson*, 104 Idaho at 233, 657 P.2d at 1101.

Id. at ___, 126 S.Ct. at 2207 (Stevens, J., dissenting). Nevertheless, we must abide by the majority ruling for purposes of Fourth Amendment analysis.

To the extent that the conditions of probation require submission to random blood, breath and/or urine analysis by law enforcement officers, our holding today transforms police officers into de facto probation officers. This raises troubling complications about the permissible scope of the detention and search when conducted, not by a probation officer in an ongoing supervisory relationship making home visits or interviewing the probationer during a scheduled appointment, but by a police officer on patrol who randomly encounters the probationer as he is going about his business. Our decision says, and I re-emphasize, that the law enforcement officer certainly does not have authority *greater than* that of a probation officer to conduct and implement such a testing procedure. Any detention and accompanying search must also be conducted at a reasonable time and in a reasonable manner so as not to be deemed arbitrary, capricious, or harassing. *See id.* at ___, 126 S.Ct. at 2202.

Nor do I mean to imply that an officer empowered to randomly detain a probationer and conduct a limited body fluid search has the right to continue to expand that search to the probationer's possessions, vehicle, or home in the absence of other established constitutional justification. In this case, Purdum never contested the escalating intrusion of the full-vehicle search. Courts should, however, regard such fruits with a strict eye to guard against any governmental abuse of this already-expansive suspicionless intrusion into a probationer's privacy.